

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HEATH VINCENT FULKERSON,

Plaintiff,

v.

ALLSTATE INSURANCE,

Defendant.

3:20-cv-00399-MMD-CLB

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

Before the court is Plaintiff Heath Fulkerson's ("Fulkerson"), application to proceed *in forma pauperis* (ECF No. 1), his *pro se* civil rights complaint (ECF No. 1-1), his motion to submit complaint (ECF No. 1-2), and Defendant Allstate's ("Allstate") motion to dismiss (ECF No. 7). For the reasons stated below, the court recommends that Fulkerson be deemed a vexatious litigant, this case be dismissed, and his *in forma pauperis* application (ECF No. 1), motion to submit complaint (ECF No. 1-2), and Allstate's motion to dismiss (ECF No. 7) be denied as moot.

I. SCREENING STANDARD

Prior to ordering service on any defendant, the Court is required to screen an *in forma pauperis* complaint to determine whether dismissal is appropriate under certain circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for the enumerated reasons). Such screening is required before a litigation proceeding *in forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir. 2015).

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 “[T]he court shall dismiss the case at any time if the court determines that – (A) the
 2 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
 3 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
 4 a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

5 Dismissal of a complaint for failure to state a claim upon which relief may be granted
 6 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 7 tracks that language. When reviewing the adequacy of a complaint under this statute, the
 8 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*
 9 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a
 10 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
 11 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a
 12 claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
 13 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

14 The Court must accept as true the allegations, construe the pleadings in the light
 15 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*
 16 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints
 17 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v.*
 18 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

19 A complaint must contain more than a “formulaic recitation of the elements of a cause
 20 of actions,” it must contain factual allegations sufficient to “raise a right to relief above the
 21 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
 22 must contain something more. . . than. . . a statement of facts that merely creates a suspicion
 23 [of] a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a
 24 minimum, a plaintiff should include “enough facts to state a claim to relief that is plausible
 25 on its face.” *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

26 A dismissal should not be without leave to amend unless it is clear from the face of
 27 the complaint the action is frivolous and could not be amended to state a federal claim, or

1 the district court lacks subject matter jurisdiction over the action. *See Cato v. United States*,
 2 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

3 **II. VEXATIOUS LITIGANT STANDARD**

4 A district court has the “inherent power to enter pre-filing orders against vexatious
 5 litigants.” *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citing 28
 6 U.S.C. § 1651(a)). Because a pre-filing order implicates a litigant’s right of access to the
 7 courts, the court should enter such an extreme remedy “only after a cautious review of the
 8 pertinent circumstances.” *Id.* Prior to entering a pre-filing order, the court must give the
 9 litigant notice and an opportunity to be heard. *Id.* (citing *De Long v. Hennessey*, 912 F.2d
 10 1144, 1147 (9th Cir. 1990)).

11 The court must set forth an adequate record for review and make “substantive
 12 findings about the frivolous or harassing nature of the plaintiff’s litigation.” *Id.* “An adequate
 13 record for review should include a listing of all the cases and motions that led the district
 14 court to conclude that a vexatious litigant order was needed.” *Id.* at 1059 (quoting *De Long*,
 15 912 F.2d at 1147). “Flagrant abuse of the judicial process cannot be tolerated because it
 16 enables one person to preempt the use of judicial time that properly could be used to
 17 consider the meritorious claims of other litigants.” *De Long*, 912 F.2d at 1148. To determine
 18 whether the litigant’s conduct is frivolous or harassing, the court evaluates “both the number
 19 and content of the filings as indicia of the frivolousness of the litigant’s claims.” *Id.* (quotation
 20 omitted).

21 A pre-filing order “must be narrowly tailored to closely fit the specific vice
 22 encountered.” *Id.* (quotation omitted). Whether to enter a pre-filing order against a vexatious
 23 litigant lies within the court’s discretion. *Id.* at 1056. The court should examine five factors:
 24 (1) the litigant’s history of litigation and in particular whether it entailed vexatious, harassing,
 25 or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation, e.g., does the litigant
 26 have an objective good faith expectation of prevailing?; (3) whether the litigant is
 27 represented by counsel; (4) whether the litigant has caused needless expense to other

1 parties or has posed an unnecessary burden on the courts and their personnel; and (5)
2 whether other sanctions would be adequate to protect the courts and other parties. *Williams*
3 *v. Nat'l Default Servicing Corp.*, No. 2:16-cv-1860-GMN-NJK, 2017 U.S. Dist. LEXIS 4111,
4 at 12-14 (D. Nev. Jan. 10, 2017), citing to *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d
5 860, 863-64 (C.D. Cal. 2004).

6 **III. DISCUSSION**

7 Fulkerson filed this action *pro se* against Allstate Insurance for “property liability and
8 insurance bad faith” related to two separate incidents, one on September 20, 2019 and the
9 other on October 5, 2019, in which Fulkerson filed claims related to injuries that occurred on
10 his father’s property. (ECF No. 1-1 at 1-2.) Fulkerson claims his father, Larry M. Fulkerson,
11 had renter’s insurance through Allstate. (*Id.* at 1.) Fulkerson asserts that the injuries were
12 not covered by Allstate even though the policy was active, and Allstate issued false
13 documents and a denial letter stating they had performed an investigation, “without actually
14 performing an investigation.” (*Id.* at 2.) Fulkerson seeks “reinstatement of each claim with
15 proper coverage,” as well as actual damages in excess of \$750,000 and compensatory
16 damages in excess of \$1,250,000. (*Id.* at 2-3.)

17 **A. RECOMMENDATION TO DISMISS**

18 First, Fulkerson’s factual allegations are conclusory, vague, and ambiguous.
19 Dismissal on those grounds alone is appropriate. Federal Rule of Civil Procedure 8(a)(2)
20 requires that a complaint contain “a short and plain statement of the claim showing that the
21 pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is
22 and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quotation and alteration
23 omitted). Here, Fulkerson’s largely incomprehensible narrative makes it nearly impossible
24 for the court to identify the factual or legal basis for his claims. Further, Fulkerson asserts
25 little more than conclusory allegations that Allstate denied claims but failed to perform an
26 investigation, but this does not provide the court with sufficient information to show Allstate
27 acted in bad faith. These statements do not create a plausible claim for relief, but instead

are a conclusory, unwarranted deduction of fact. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (A court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences).

Further, the insurance policy at issue appears to be under Larry Fulkerson's name, not the Plaintiff, Heath Fulkerson. Fulkerson does not assert himself as a named insured, additional insured, an "insured person" or any other individual related to the alleged policy between Allstate and Larry Fulkerson. Thus, it is unclear how Fulkerson has standing to bring this action.

Based on the above, Fulkerson states no claim upon which relief may be granted, and given the vague nature of the allegations, amendment would be futile. See *Cato*, 70 F.3d at 1106. Further, because the court recommends dismissal of the complaint, the court recommends that Allstate's motion to dismiss (ECF No. 7) be denied as moot.²

B. RECOMMENDATION TO DEEM FULKERSON A VEXATIOUS LITIGANT

Fulkerson has filed multiple cases *pro se* in the District of Nevada:

1. *Fulkerson v. Allstate Insurance, et al*, 3:19-cv-00710-RCJ-WGC
2. *Fulkerson v. Farmers Insurance Group et al*, 3:19-cv-00714-MMD-WGC
3. *Fulkerson v. State of Nevada*, 3:19-cv-00721-MMD-WGC
4. *Fulkerson v. Public Utilities Commission Nevada*, 3:19-cv-00722-MMD-CLB
5. *Fulkerson v. Allstate Insurance et al*, 3:19-cv-00729-MMD-CLB (as petitioner)
6. *Fulkerson v. Farmers Insurance Group*, 3:19-cv-00753-MMD-WGC
7. *Fulkerson v. Public Utilities Commission Nevada et al*, 3:20-cv-00007-RCJ-WGC
8. *Fulkerson v. Geico*, 3:20-CV-00168-MMD-CLB
9. *Fulkerson v. City of Reno et al*, 3:20-cv-00206-MMD-WGC

² The court further notes that the motion to dismiss is premature, as a screening is required before a litigation proceeding *in forma pauperis* may proceed to serve a pleading. See *Glick*, 803 F.3d at 507.

10. *Fulkerson v. Costco*, 3:20-CV-00207-MMD-CLB
11. *Fulkerson v. United States Secret Service et al*, 3:20-cv-00227-RCJ-WGC
12. *Fulkerson v. Internal Revenue Service et al*, 3:20-cv-00239-MMD-WGC
13. *Fulkerson v. Thrive*, 3:20-CV-00241-MMD-CLB (filed on behalf of his spouse)
14. *Fulkerson v. calPERS*, 3:20-CV-00251-MMD-CLB
15. *Fulkerson v. The Hartford*, 3:20-cv-00398-MMD-WGC
16. *Fulkerson v. Nevada Department of Business and Industry*, 3:20-cv-00400-MMD-CLB
17. *Fulkerson v. Allstate Insurance*, 3:20-cv-00409-MMD-CLB
18. *Fulkerson v. State of Nevada Department of Business and Industry*, 3:20-cv-410-MMD-CLB
19. *Fulkerson v. State of Nevada Office of the Attorney General*, 3:20-cv-00419-RCJ-WGC
20. *Fulkerson v. Department of Justice*, 3:20-cv-00425-MMD-WGC
21. *Fulkerson v. James Hardie Building Products, Inc.*, 3:20-cv-00516-MMD-CLB
22. *Fulkerson v. James Hardie Building Products, Inc.*, 3:20-cv-00519-RCJ-CLB

The majority of the above cases (excluding the instant case) have been dismissed or have outstanding Report and Recommendations to dismiss, most often based on lack of jurisdiction, failure to state a claim, or as frivolous. See *Fulkerson v. Farmers Insurance Group et al*, 3:19-cv-00714-MMD-WGC (closed 01/07/20) (dismissed in its entirety for lack of subject matter jurisdiction); *Fulkerson v. State of Nevada*, 3:19-cv-00721-MMD-WGC (closed 02/10/20) (dismissed for failure to file an amended complaint); *Fulkerson v. Public Utilities Commission Nevada*, 3:19-cv-00722-MMD-CLB (closed 04/07/20) (dismissed for failure to state a claim and being a duplicative claim); *Fulkerson v. Allstate Insurance et al*, 3:19-cv-00729-MMD-CLB (closed 04/07/20) (dismissed for duplicative claim and not being a proper plaintiff); *Fulkerson v. Farmers Insurance Group*, 3:19-cv-00753-MMD-WGC (closed 06/03/20) (dismissed for failure to file an amended complaint); *Fulkerson v. Public*

1 *Utilities Commission Nevada et al*, 3:20-cv-00007-RCJ-WGC (motion to dismiss granted in
 2 part); *Fulkerson v. Geico*, 3:20-CV-00168-MMD-CLB (complaint dismissed with leave to
 3 amend); *Fulkerson v. City of Reno et al*, 3:20-cv-00206-MMD-WGC (closed 09/03/20)
 4 (dismissed with prejudice for failure to state a claim); *Fulkerson v. United States Secret*
 5 *Service et al*, 3:20-cv-00227-RCJ-WGC (closed 09/21/20) (dismissed with prejudice for
 6 failure to state a claim and as frivolous); *Fulkerson v. Internal Revenue Service et al*, 3:20-
 7 cv-00239-MMD-WGC (Report and Recommendation pending to dismiss based on failure to
 8 file *IFP*); *Fulkerson v. Thrive*, 3:20-CV-00241-MMD-CLB (filed on behalf of spouse) (Report
 9 and Recommendation pending to dismiss based on non-attorney *pro se* filing on behalf of
 10 another *pro se*); *Fulkerson v. calPERS*, 3:20-CV-00251-MMD-CLB (closed 07/06/20)
 11 (dismissed based on lack of personal jurisdiction and improper venue); *Fulkerson v. The*
 12 *Hartford*, 3:20-cv-00398-MMD-WGC (complaint dismissed, with leave to amend); *Fulkerson*
 13 *v. Nevada Department of Business and Industry*, 3:20-cv-00400-MMD-CLB (pending
 14 screening); *Fulkerson v. Allstate Insurance*, 3:20-cv-00409-MMD-CLB (pending screening);
 15 *Fulkerson v. State of Nevada Department of Business and Industry*, 3:20-cv-410-MMD-CLB
 16 (pending screening); *Fulkerson v. State of Nevada Office of the Attorney General*, 3:20-cv-
 17 00419-RCJ-WGC (closed 09/21/20) (dismissed based on *Heck* bar and *Younger*
 18 abstention); *Fulkerson v. Department of Justice*, 3:20-cv-00425-MMD-WGC (closed
 19 09/03/20) (dismissed with prejudice for failure to state a claim and as frivolous); *Fulkerson*
 20 *v. James Hardie Building Products, Inc.*, 3:20-cv-00516-MMD-CLB (pending screening);
 21 *Fulkerson v. James Hardie Building Products, Inc.*, 3:20-cv-00519-RCJ-CLB (pending
 22 screening).

23 The court also takes judicial notice of numerous filings made by Fulkerson in the
 24 Second Judicial District Court for the State of Nevada, as well as a filing in the United States
 25 District Court for the Northern District of California and the United States Court of Appeals
 26 for the Ninth Circuit, but compiling a list of all his known cases would be impractical.

27 “No one, rich or poor, is entitled to abuse the judicial process.” *Tripathi v. Beaman*, 878

1 F.2d 351, 353 (10th Cir. 1989). Fulkerson has a history of filing *pro se* vexatious and
2 duplicative lawsuits. Fulkerson does not have a good faith motive in pursuing frivolous
3 litigation and he has abused the judicial process by filing lawsuits that he knows will be
4 dismissed. Fulkerson's actions have posed an unnecessary burden on this Court and are a
5 vexatious abuse of the judicial process. Fulkerson is likely to continue his abuse of the
6 judicial process. Requiring Fulkerson to seek leave prior to filing new lawsuits is narrowly
7 tailored because he will still have access to this court by requesting leave. Although the
8 court is raising this issue *sua sponte*, Fulkerson will have notice and a chance to be heard
9 through the objection process.

10 **1. Enjoining Vexatious Litigant**

11 If a litigant is deemed vexatious, he will be enjoined from filing any further action or
12 papers in this district without first obtaining leave of the Chief Judge of this court. In order to
13 file any papers, the vexatious litigant must first file an application for leave. The application
14 must be supported by a declaration of plaintiff stating: (1) that the matters asserted in the
15 new complaint or papers have never been raised and disposed of on the merits by any court;
16 (2) that the claim or claims are not frivolous or made in bad faith; and (3) that he has
17 conducted a reasonable investigation of the facts and investigation supports his claim or
18 claims. A copy of the order deeming the litigant vexatious must be attached to any
19 application. Failure to comply will be sufficient grounds for denial of the application. *See De*
20 *Long*, 912 F.2d at 1146-47.

21 **IV. CONCLUSION**

22 For the reasons articulated above, the court recommends that Fulkerson's complaint
23 (ECF No. 1-1) be dismissed for failure to state a claim, his application to proceed *in forma*
24 *pauperis* (ECF No. 1) be denied as moot, his motion to submit complaint (ECF No. 1-2) be
25 denied as moot, Allstate's motion to dismiss (ECF No. 7) be denied as moot, and Fulkerson
26 be deemed a vexatious litigant.

27 The parties are advised:

1 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 2 Practice, the parties may file specific written objections to this Report and Recommendation
 3 within fourteen days of receipt. These objections should be entitled “Objections to
 4 Magistrate Judge’s Report and Recommendation” and should be accompanied by points
 5 and authorities for consideration by the District Court.

6 2. This Report and Recommendation is not an appealable order and any notice
 7 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
 8 Court’s judgment.

9 **V. RECOMMENDATION**

10 **IT IS THEREFORE RECOMMENDED** that Fulkerson’s application to proceed *in*
 11 *forma pauperis* (ECF No. 1) be **DENIED** as moot;

12 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint (ECF No. 1-1);

13 **IT IS FURTHER RECOMMENDED** that Fulkerson’s complaint (ECF No. 1-1) be
 14 **DISMISSED**, for failure to state a claim;

15 **IT IS FURTHER RECOMMENDED** that the motion to submit complaint (ECF No. 1-
 16 2) be **DENIED** as moot;

17 **IT IS FURTHER RECOMMENDED** that Allstate’s motion to dismiss (ECF No. 7) be
 18 **DENIED** as moot;

19 **IT IS FURTHER RECOMMENDED** that Heath V. Fulkerson be deemed a
 20 **VEXATIOUS LITIGANT** pursuant to 28 U.S.C. § 1651(a) and be **ENJOINED** and
 21 **PROHIBITED** from filing any complaint, petition, or other document in this court without first
 22 obtaining leave of this court;


23 **IT IS FURTHER RECOMMENDED** that the Court enter an order stating that if Heath
 24 V. Fulkerson intends to file any papers with the court, he must first seek **LEAVE** of the Chief
 25 Judge of this court in accordance with the procedure outlined above;

26 **IT IS FURTHER RECOMMENDED** that the Clerk of Court be authorized to reject or
 27 refuse to file, and/or discard any new complaint, petition, document on a closed case, or any

1 other document submitted without first seeking leave of the Chief Judge as stated above;
2 and

3 **IT IS FURTHER RECOMMENDED** that this action be **CLOSED** and that judgment
4 be entered accordingly.

5 **DATED:** October 8, 2020.

6 
7 **UNITED STATES MAGISTRATE JUDGE**